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No. 87-309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MADELINE RITTER,

Petitioner,

v.

MOUNT SAINT MARY'S COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

NEIL J. DILLOFF*
JONATHAN D. SMITH
PIPER & MARBURY
1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
(301) 539-2530

Attorneys for Mount Saint Mary's College, Respondent.

*Counsel of Record.

The Daily Record Co., Baltimore, MD 21202

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in applying collateral estoppel to petitioner's age discrimination and equal pay claims so as to bar readjudication of the same legal issues before a jury?

2. Was the Court of Appeals correct in applying collateral estoppel to petitioner's Equal Pay Act claim after a full and fair hearing before the trial court on the qualifications of petitioner's proposed job comparator?

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STATEMENT OF THE CASE

Having been denied tenure because she lacked suitable qualifications, petitioner Madeline Ritter comes to this Court seeking to overrule the academic judgment of the Department Chairmen, President and Board of Trustees of Mount Saint Mary's College ("the College") and the factual and legal findings of the Maryland Commission on Human Relations, the United States District Court for the

District of Maryland (on two occasions) and the United States Court of Appeals for the Fourth Circuit (on two occasions).

Petitioner filed her action against the College on March 17, 1980. She was provided with unlimited discovery and complete access to the College's employment records. After her claims under the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. 621, *et seq.*; and Equal Pay Act ("EPA") 29 U.S.C. § 206(d), were dismissed, the case proceeded with respect to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Mrs. Ritter sought no interlocutory appeal under 28 U.S.C. § 1292(b), no certification of the dismissals as a final judgment pursuant to Fed. R. Civ. P. 54(b), and proceeded to trial on the Title VII claim without requesting an advisory jury under Fed. R. Civ. P. 39(c).

The Title VII trial occurred in April and May, 1981. Petitioner's case consisted almost entirely of an attack upon the qualifications of John Popenfus, another faculty member. The District Court found in favor of the College on May 27, 1981, holding, among other things, that petitioner was not qualified for tenure and that John Popenfus was clearly more qualified than Mrs. Ritter.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the District Court as to the Title VII claim but reversed the dismissal of the EPA and ADEA claims and remanded them for further consideration. Petitioner requested a rehearing of the Fourth Circuit's decision but did not raise any issue with respect to an alleged deprivation of her right to a jury trial in her petition for rehearing. Her petition was denied.

After remand, the College again opened its faculty employment records to Mrs. Ritter. Through discovery, the

College sought to determine whether Mrs. Ritter would attempt to compare herself to anyone other than John Popenfus. The District Court cautioned Mrs. Ritter that she should seek other comparators if she wanted to pursue her claims. Despite this admonition and unlimited access to the College's files, petitioner again identified John Popenfus as her only comparator. Since the issue of the comparison of Mrs. Ritter and John Popenfus had been the subject of six years of litigation, a five-day trial on the merits and an appeal to the Fourth Circuit, the District Court granted summary judgment in favor of the College, holding, among other things, that collateral estoppel barred Mrs. Ritter from relitigating well-trodden ground. Petitioner appealed again to the Court of Appeals, which affirmed the District Court.

Petitioner now seeks to turn back the clock and undo four judicial opinions by having this Court place this case back into the posture it had on March 17, 1980. By this brief in opposition, the College seeks to demonstrate that this action, far from rising to constitutional significance, is nothing more than a garden variety tenure case brought by a dissatisfied faculty member.

SUMMARY OF REASONS FOR DENYING THE PETITION

This Court's decisions in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and *Katchen v. Landy*, 382 U.S. 323 (1966) are dispositive of all issues raised by petitioner. As a result, the instant action poses no new or important issue warranting review by this Court. Additionally, the apparent conflict between the Fourth and Seventh Circuits is based on factual and procedural differences between the respective cases that raise no legitimate concerns for inconsistent adjudications in the future.

ARGUMENT

I.

THE FOURTH CIRCUIT'S DECISION IS CONSONANT WITH THE DECISIONS OF THIS COURT, WHICH DO NOT REQUIRE RECONSIDERATION.

Petitioner seeks to distinguish this Court's decisions in *Parklane* and *Katchen* because those cases are dispositive here. The Court of Appeals specifically relied on *Parklane* and declined to "involve itself in the laborious and inconclusive policy analysis suggested by the parties because the Supreme Court has already undertaken this policy analysis for us." *Ritter v. Mount Saint Mary's College*, 814 F.2d 986, 991 (4th Cir. 1987). Simply stated, *Parklane* and the opinion of the Court of Appeals both concluded that the "judicial interest in the economical resolution of cases, which interest underlies the doctrine of collateral estoppel, does override the interest of the plaintiff in retrying before a jury the facts of a case determined by a court sitting in equity." *Id.* The pragmatic considerations supporting this conclusion are set forth in both *Parklane* and in the Court of Appeals' decision. In fact, this case is of significantly less importance than *Parklane* because there is mutuality of estoppel here, while in *Parklane*, this Court extended the scope of collateral estoppel to situations where no mutuality of parties existed. Far from being an expansion of *Parklane*, the instant action falls easily within its scope.

Furthermore, the result below does no violence to the holdings of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) or *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1961). As noted in *Parklane*, those cases set forth no more than a general prudential rule that parties and courts should strive to decide legal claims first where those claims are mixed with equitable ones in the same action. That rule has lost none of its vitality. In the rare case in which

equitable issues are fully and fairly tried first, however, the Seventh Amendment does not compel that expensive and time consuming litigation start anew on issues already resolved. As this Court said in *Parklane*, the application of collateral estoppel does not violate the Seventh Amendment where "there is no further fact-finding function for the jury to perform, since the common factual issues have been resolved in the previous action." *Id.* at 336. *See Richardson Greenshields Securities, Inc. v. Mui-Hin Lau, et al.*, No. 87-7057, slip op. at n.4 (2d Cir. July 30, 1987) (citing *Ritter* with favor).

When placed in proper context, Mrs. Ritter's participation in the Title VII trial and intention to accept the benefits of victory if she had prevailed belie the alleged "injury" from the failure to have a jury trial on the identical issues. By voluntarily participating in a non-jury trial on the merits of her Title VII claim and foregoing her other procedural alternatives, petitioner gambled and lost. Just as the College had asserted collateral estoppel defensively to preclude relitigation of already decided issues, petitioner likewise was poised to assert collateral estoppel offensively in her ADEA and EPA claims. As the Court of Appeals stated, "One trial of common facts is enough." *Ritter v. Mount Saint Mary's College*, 814 F.2d at 991.

II.

THE DIFFERENCES IN RESULTS REACHED BY THE FOURTH AND SEVENTH CIRCUITS ARE BASED ON FACTUAL DISSIMILARITIES AND, AS A RESULT, NO REVIEW BY THIS COURT IS WARRANTED.

The asserted conflict between *Ritter* and *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987), is nothing more than a difference in results based on differences in the factual and legal postures of those cases. Both courts of appeal agree on the purpose and underpinnings of the doctrine of collateral estoppel. If any

differences exist between the courts, they are based on the question of whether the Seventh Amendment bars the application of collateral estoppel in cases like this. This Court already has decided this issue in *Parklane* and *Katchen* and need not revisit it.

Ritter and *Hussein* are alike in that both courts held that a judgment in a full and fair trial on the merits of a Title VII claim must be affirmed even where legal claims were dismissed before trial. The courts also agree that collateral estoppel is a judicially developed doctrine that should be applied where appropriate to relieve litigants and the courts of the cost and waste involved in multiple consideration of the same issues between the same parties. The courts diverge only because those policies called for different results when applied to different facts and circumstances.

In *Ritter*, petitioner had numerous opportunities to avoid the application of collateral estoppel but availed herself of none. She proceeded to trial on her Title VII claim rather than seek a method to have her jury claims heard first, a factor of importance to this Court in *Parklane*, 439 U.S. at 337, n.24. During her first appeal she had the opportunity to seek the prevention of the application of collateral estoppel by requesting reversal of the Title VII judgment based on the arguments she makes here. On remand, she had the opportunity for a jury trial on the merits of her ADEA and EPA claims if she chose to compare herself to someone other than John Popenfus. The facts underlying the Title VII, ADEA and EPA claims were not necessarily identical. Collateral estoppel barred her claims only because she challenged no employment or compensation decisions at the College other than those related to John Popenfus. Her failure to do so speaks more to the weakness of her claims and the tunnel-vision with which she viewed those claims than it does to the alleged evils of the Fourth Circuit's limited application of

collateral estoppel. In light of these facts, the Fourth Circuit found it fair to bar continued litigation.

In *Hussein*, however, a majority of the court found that application of collateral estoppel would unfairly bar the plaintiff from any further litigation. Unlike *Ritter*, the Seventh Circuit concluded that the underlying facts were the same for all of Hussein's claims. The Seventh Circuit was requested to invoke collateral estoppel in Hussein's first and only appeal. If it did so, Hussein would have been deprived of any opportunity to develop his legal claims and present them to a jury. Ritter had that opportunity, but simply failed to come forth with any new facts or different comparators that would permit her to continue.

Furthermore, *Ritter* and *Hussein* differ because there was an earlier valid and reviewed judgment in *Ritter*, but not in *Hussein*. The Fourth Circuit reviewed and affirmed the Title VII judgment in the first appeal and was not asked to vacate that judgment until the second appeal. If it had done so, it faced the prospect of a third round of judgments and appeals. *Hussein*, on the other hand, presented a situation where there was no earlier valid judgment. The Title VII judgment there was on review for the first time so the appellate court was not asked to vacate its earlier judgment. The Seventh Circuit used the lack of an earlier, valid judgment in its attempt to distinguish *Parklane*. *Hussein*, 816 F.2d at 356. That distinction is absent in the instant case.

Hussein, far from being a "red wagon" case, is a mixture of four separate opinions that raises the possibility of inconsistent adjudications — a danger that collateral estoppel is intended to avoid. In *Hussein*, the Title VII judgment in favor of the employer stood while the other claims were remanded for further proceedings and potentially different outcomes. That possibility was avoided in *Ritter*. A similarity between *Ritter* and

Hussein, however, is Senior Judge Eschbach's comment that "part of the plaintiff's problem was of his own making." *Hussein*, at p. 357. Petitioner's "problem" here was her failure to take an interlocutory appeal or object to the proceeding of the Title VII trial before the District Court's dismissal of her ADEA and EPA claims was heard by the Fourth Circuit. Instead, petitioner chose to litigate her Title VII claim in the hope that, if successful at trial and on appeal of her ADEA and EPA claims, she would have the benefit of offensive collateral estoppel (or alternatively, could have settled for a Title VII victory and not appealed at all). *Hussein* had no such options.

While it is true that petitioner, in the first instance, would have been entitled to a jury trial on her ADEA and EPA claims, the District Court's error in dismissing them resulted in no prejudice to her. As the Fourth Circuit held, this Court has ruled in *Parklane* that the "harm" of the denial of one's preferred trier of fact is "insufficient to override the judicial interest in the speedy resolution of disputes." *Ritter*, 814 F.2d at 991.

III.

THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY APPLIED COLLATERAL ESTOPPEL TO PETITIONER'S EQUAL PAY ACT CLAIM.

Petitioner's final argument is that this Court should review this case because the Court of Appeals incorrectly applied collateral estoppel to her EPA claim. She contends that "the only issue decided by the district court in trial of the Title VII count was Professor Ritter's qualifications for tenure." (Pet. 15.) That is not so. The District Court found not only that petitioner was not qualified, but also that John Popenfus was "clearly more qualified" than she. (Pet. A-13, A-27.) Both issues were litigated with vigor in the District Court, causing the Fourth Circuit little difficulty with allowing collateral estoppel effect to each. *Ritter*, 814

F.2d at 993-994. The Court of Appeals was correct in its application of the doctrine. Accordingly, its decision does not merit review by this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

NEIL J. DILLOFF*
JONATHAN D. SMITH
PIPER & MARBURY
1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
(301) 539-2530

Attorneys for Mount
Saint Mary's College,
Respondent.

Counsel of Record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 1987, three (3) copies of the Respondent's Brief in Opposition were mailed, postage prepaid, to:

Alison Pease, Esquire
Harris and Kahn
14th Floor
1600 Market Street
Philadelphia, Pennsylvania 19103

Neil J. Dilloff